

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA)	
)	Criminal No.: 3:00-CR-400-P
v.)	
)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and)	
BENNETT T. MARTIN,)	
)	FILED: June 22, 2001
Defendants.)	

MEMORANDUM OF THE UNITED STATES IN SUPPORT OF
MOTION *IN LIMINE* TO EXCLUDE FROM ADMISSION AT
TRIAL ALL EVIDENCE RELATED TO POLYGRAPH TESTS AND RESULTS

I
INTRODUCTION

The United States moves this Court for a ruling in limine excluding from admission at trial any evidence related to two unsolicited, private, ex parte polygraph examinations administered on July 20, 2000, and September 29, 2000, to Casey N. Martin, defendant Bennett T. Martin's brother and the senior vice president and secretary/treasurer of defendant Martin News Agency, Inc. ("Martin News") during the charged conspiratorial period. The opinion of the polygraph examiners was that Casey Martin was not deceptive in answering "relevant" questions relating to Casey Martin's involvement in discussions and decisions regarding allocation or division of territories between Ben Martin and Brian Weiner, or Martin News and Trinity News. Although the defendants have not yet indicated that they intend to introduce evidence of these polygraph tests at trial, the United States anticipates that they might try to do so.

The United States respectfully requests that this Court enter an Order excluding from admission at trial any evidence related to the polygraph tests taken by Casey Martin. Further, the United States requests that defendant Ben Martin, his counsel, Richard Alan Anderson, counsel for defendant Martin News, Michael P. Gibson, and any other witnesses be instructed not to make any statement or reference to the polygraph tests at any time during the trial proceeding. The United States requests that this Court find Casey Martin's polygraph tests inadmissible under Fed. R. Evid. 702 and 403. In the alternative, pursuant to Fed. R. Evid. 104, the United States requests that an evidentiary hearing be held under Daubert to establish the invalidity and unreliability of these polygraph tests under Rule 702.

II LAW AND ARGUMENT

In United States v. Posado, 57 F.3d 428 (5th Cir. 1995), the Fifth Circuit abandoned its long-standing rule that polygraph evidence is per se inadmissible.¹ Instead, the Posado court held that the admissibility of polygraph evidence, like all scientific evidence, is governed by the standards announced in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). First, as outlined in Daubert, pursuant to Rule 702, the trial judge must determine if proffered expert testimony is both relevant and reliable. Posado, 57 F.3d at 432. Second, as stated in Posado, even when polygraph evidence satisfies Rule 702, the evidence may be inadmissible under Rule 403 when its probative value is substantially outweighed by its prejudicial effect. Id. at 435. For reasons discussed fully below, Casey Martin's polygraph tests are inadmissible under both

¹The Posado court remanded the case for determination of the admissibility of the polygraph evidence in accordance with Daubert. On remand, the district court held the polygraph evidence inadmissible under both Rule 702 and Rule 403. United States v. Ramirez, 1995 WL 918083 (S.D. Tex. 1995).

Rule 702 and Rule 403.

A. THE POLYGRAPH TESTS ARE INADMISSIBLE
UNDER RULE 702 OF THE FEDERAL RULES OF EVIDENCE

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Supreme Court held that, pursuant to Rule 702, a trial court must determine whether proffered expert testimony is both relevant and reliable. 509 U.S. at 594. The Daubert Court set forth a two-prong analysis for determining whether scientific evidence is admissible under Rule 702: (1) whether the evidence constitutes scientific knowledge; and (2) whether the evidence is relevant in that it will “assist the trier of fact to understand the evidence or to determine a fact in issue.” Id. at 589. The Daubert Court identified several factors for a trial court to consider in acting as the “gatekeeper” for the admission of scientific expert testimony, including whether the expert’s theory or procedure can be and has been tested; whether the expert’s theory or technique has been “subjected to peer review and publication;” what is the “known or potential rate of error;” the “existence and maintenance of standards controlling the technique’s operation;” and whether the expert’s theory has attained “general acceptance” in the “relevant scientific community.” Id. at 593-94. See also United States v. Posado, 57 F.3d 428, 432-33 (5th Cir. 1995).

The government has found no reported case in the Fifth Circuit in which a trial judge either admitted polygraph evidence or erroneously excluded polygraph evidence in a jury trial. Several Daubert factors weigh heavily against the admission of polygraph evidence at trial. For example, courts have found that polygraph theories or procedures cannot be adequately tested and verified outside of a laboratory situations where the subjects participate in the testing without

risk and have no stake in the outcome. See, e.g., United States v. Ramirez, 1995 WL 918083 at 2 (S.D. Tex. 1995), attached as Exhibit A. Additionally, the rate of error cannot be determined to a reasonable degree of scientific certainty outside of laboratory experiments. Id.; United States v. Cordoba, 991 F. Supp. 1199, 1203-04 (C.D. Cal. 1998). Although polygraph evidence has been subjected to peer review and publication, and has gained some degree of acceptance, the admissibility of polygraph evidence at trial is still the subject of much debate. The Cordoba court noted that there is “considerable evidence of a lack of general acceptance in the scientific community for use of polygraph evidence where reliability of the results is critical, such as in courtroom, fact-determinative use.” Cordoba, 991 F. Supp. at 1205 (emphasis added).

The Supreme Court has also thoroughly reviewed issues concerning the validity and reliability of polygraphs for purposes of admission at trial.² In its decision upholding the exclusion of such evidence at trial, the Supreme Court stated:

[T]here is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques. Some studies have concluded that polygraph tests overall are accurate and reliable. Others have found that polygraph tests assess truthfulness significantly less accurately -- that scientific field studies suggest the accuracy rate of the ‘control question technique’ polygraph is ‘little better than could be obtained by the toss of a coin,’ that is, 50 percent.

United States v. Scheffer, 118 S.Ct. 1261, 1265 (1998) (citations omitted). See generally 1 D.

Faigman et al., Modern Scientific Evidence §14-1.4, at 565, n.14-2 and §14-3.0 (1997)

² At issue in Scheffer was the constitutionality of Military Rule of Evidence 707, making polygraph evidence inadmissible in court martial proceedings. Although arising under military law, the impact of Scheffer upon federal courts is significant because Military Rule of Evidence 707 is the same as Fed. R. Evid. 702, and military courts use Daubert to control the admissibility of scientific evidence. See United States v. Cordoba, 991 F. Supp. 1199, 1200, n.4 (C.D. Cal. 1998).

(Reviewing studies on the validity and reliability of polygraph tests and concluding: “Scientific opinion about the validity of polygraph techniques is extremely polarized.”)

The Scheffer Court stated further:

Although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner’s conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams.

Id. at 1266.

If even the best polygraph exams are fraught with certain doubts and uncertainties, then the tests in this case are even more problematic. The validity and reliability of a polygraph test is highly dependent on how the polygraph examiner conducts the pre-test interview, poses the questions, and administers and scores the test. Cordoba, 991 F. Supp. at 1205. The United States was not invited to be present for Casey Martin’s pre-test interviews, and was provided just a brief synopsis of what occurred during the interviews. Further, as discussed more fully below with respect to the Rule 403 analysis, the polygraph tests at issue here involve ambiguous, complex questions that lend themselves to self-serving interpretation and rationalization sufficient to distort the accuracy of such tests. The government also did not receive the underlying test data, rendering it impossible to judge the examiner’s opinions as to each relevant test question and as a whole. Accordingly, Casey Martin’s polygraph tests are inadmissible under Rule 702.

**B. THE POLYGRAPH TESTS ARE INADMISSIBLE
UNDER RULE 403 OF THE FEDERAL RULES OF EVIDENCE**

Assuming Casey Martin’s polygraph tests are admissible under Rule 702, the Court must still determine whether the polygraph evidence satisfies Rule 403. Rule 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403.

Courts routinely have held that evidence related to polygraph tests is inadmissible under Rule 403. See, e.g., Conti v. C.I.R., 39 F.3d 658, 663 (6th Cir. 1994) (upholding exclusion of polygraph test, and stating “unilaterally obtained polygraph evidence is almost never admissible under Evidence Rule 403.”); United States v. Gilliard, 133 F.3d 809, 815-16 (11th Cir. 1998) (affirming decision to exclude polygraph test under Rule 403, in part because the United States was not present during the pretest interview and polygraph test); United States v. Kwong, 69 F.3d 663, 668 (2d. Cir. 1995) (polygraph test inadmissible under Rule 403 where questions asked were ambiguous and misleading). Here, the probative value of Casey Martin’s polygraph tests is slight, the potential for prejudice is great, and the evidence is misleading and not helpful to the jury. Accordingly, any evidence of or reference to Casey Martin’s polygraph tests should be excluded from trial.

1. The Polygraph Tests Should Be Excluded In This Case Because
 Their Probative Value Is Substantially Outweighed By Their Prejudicial Effect

Given the questionable reliability of polygraph tests, the probative value of polygraph evidence is minimal. On the other hand, the prejudicial effect of this evidence is substantial. Two factors that weigh most heavily against the admission of polygraph evidence are (1) when the government is denied the opportunity to participate in the administration of the polygraph test; and (2) when the polygraph evidence will be offered at trial before a jury. United States v.

Pettigrew, 77 F.3d 1500, 1515 (5th Cir. 1996).

In this case, the United States was not present for pre-test and post-test interviews of Casey Martin, and therefore has no idea what was said or done that may have influenced the accuracy of the tests. The United States also had no opportunity to observe whether any countermeasures were used to distort the reliability or accuracy of the polygraph tests. Under these circumstances, at trial the government cannot conduct an effective cross examination on the polygraph tests. Furthermore, using polygraph evidence to discredit the government's witnesses or bolster the defendants' witnesses intrudes upon the function of the jury to observe witnesses and determine their credibility because polygraph evidence "cloaks itself in an aura of infallibility." United States v. Ramirez, 1995 WL 918083 at 4 (S.D. Tex. 1995).

2. The Polygraph Tests Should Be Excluded In This Case
 Because Such Evidence Is Misleading And Not Helpful To The Jury

It is undisputed that the validity of polygraph results in a given case is absolutely dependent on certain conditions such as a properly conducted examination by a competent examiner. United States v. Cordoba, 991 F. Supp 1199, 1205 (C.D. Cal. 1998). It is also undisputed that the value of polygraph tests is highly dependent on the questions posed to the subject by the polygraph examiner. See, e.g., United States v. Piccinonna, 885 F.2d. 1529, 1537 (11th Cir. 1989) (stating that a trial court may exclude polygraph tests when, among other things, "the questions were irrelevant or improper"); United States v. Lech, 895 F. Supp. 582, 585 (S.D.N.Y. 1995) (polygraph test inadmissible under Rule 403 where questions are misleading, calling for the defendant to assert his belief about the legal implications of his actions). Polygraph tests do not measure the truth, but rather the subject's perception of the truth. Posado, 1995 WL

918083 at 4. Relevant and reliable results are therefore less likely when the wording of the questions call for opinions, understandings or legal conclusions, rather than specific factual circumstances. Id.

In his first polygraph test, attached as Exhibit B, Casey Martin was asked and answered three “relevant-issue”

test questions as follows:

Relevant Q1: Were you present at any meeting when Bryan Wiener discussed dividing territories?

Answer: No.

Relevant Q2: Were you present at any meeting when Bryan Wiener and your brother discussed dividing territories?

Answer: No.

Relevant Q3: Did you ever participate in any decision to divide territories between Trinity News and Martin News?

Answer: No.

In his second polygraph test, attached as Exhibit C, Casey Martin was asked and answered two “relevant-issue” test questions as follows:

Relevant Q1: Were you part of a decision, during 1988, not to service stores in Ellis County because Bryan Wiener’s company did business there?

Answer: No.

Relevant Q2: Did you have a meeting during August 1990, where Bryan Wiener discussed restoring territorial boundaries.

Answer: No.

None of these questions or responses of the polygraph tests are helpful to the jury,

because none definitively establishes the guilt or innocence of the defendants, Ben Martin and Martin News. All three questions involve terms that have not been defined, such as “meeting,” “decision,” “discussed,” “dividing territories,” and “restoring territorial boundaries.” The answers to these questions easily may have been distorted by a restrictive interpretation of one or more of these words. For example, in answering questions about his presence at any “meeting,” Casey Martin could have rationalized that a “meeting” was limited to something official or more formal than two or more people having a conversation over lunch or dinner. Answers to questions containing terms of art, such as “dividing territories” and “restoring territorial boundaries,” may be skewed if Casey Martin did not understand their particular meanings, or if those particular words were not uttered at the meetings. Further, only the first question in the second test addresses customers or stores specifically, and that question is limited to stores in Ellis County, not, for example, Dallas or Tarrant counties. Also, the third question in the first polygraph test, and the first question in the second test, are narrowly limited to his “participation” in any decision to divide territories. These questions do not address -- nor does any question posed to Casey Martin address -- whether he has any knowledge, information or awareness about decisions made by others at Martin News, including Ben Martin. As such, the polygraph evidence has little probative value, but is extremely prejudicial to the United States in that it is misleading and will confuse issues for the jury. Accordingly, the United States respectfully requests that this Court find Casey Martin’s polygraph tests not admissible under Rule 403 of the Federal Rules of Evidence because the probative value of the evidence is substantially outweighed by its prejudicial effect.

III
CONCLUSION

For the foregoing reasons, the United States requests that this Court find Casey Martin's polygraph test inadmissible under Rules 702 and 403, and enter an order excluding from admission at trial any evidence related to the polygraph test of Casey Martin. Further, the United States requests that Defendant Ben Martin, his counsel, Richard Alan Anderson, and counsel for defendant Martin News, Michael P. Gibson, be instructed not to make any statement or reference to this polygraph test at any time during the trial proceeding. In the alternative, pursuant to Rules 104 and 702, the United states requests a Daubert hearing to establish the unreliability of the polygraph test.

Respectfully Submitted,

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